

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 24, 1997

TO: Dorothy L. Moore-Duncan, Regional Director, Region 4

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: R.M. Shoemaker Co., Case 4-CA-26444

524-5029-5050, 524-5073-9600, 524-8307-1100

This case was submitted for advice as to whether the Employer violated Section 8(a)(3) and (1) by:

1. after the lawful termination of its 8(f) relationship under a multi-employer area agreement, transferring its Union member unit employees to the payroll of a signatory employer while continuing to employ them as a joint employer under the terms of the new area agreement without any changes in their conditions of employment, or
2. terminating the joint employer relationship, subcontracting to other signatory employers all of the work it had been self-performing and laying off its remaining unit employees, and thus becoming a non-employing "construction manager" rather than an employing general contractor, in response to the Union's threat that it would resume its strike and picketing against the Employer in order to get a new 8(f) contract.

For the reasons articulated by the Region in its Request for Advice dated October 21, 1997, we agree that the charge in this case should be dismissed, absent withdrawal. In particular, we note that the Employer's change from an employing general contractor to a non-employing construction manager apparently is a significant change in the operation of its business that had been planned for a long time.⁽¹⁾ Therefore, even assuming that the Employer's decision to complete the transition from a general contractor to a construction manager was accelerated because of Section 7 considerations, i.e., the employees' strike in support of the Union's demand that the Employer sign a new contract, the Employer's decision to no longer employ employees is akin to a decision to go out of business altogether. See *Darlington Mfg. Co. v. NLRB*,⁽²⁾ where the Supreme Court found that a complete, as opposed to partial, plant closure would not violate Section 8(a)(3) even though the employer's plant closure was motivated by union animus.

However, assuming arguendo that the Employer's change from a general contractor to a non-employing construction manager is not "going out of business" in the *Darlington* sense, we conclude that the Employer's actions did not violate Section 8(a)(3) because the impact on the employees' Section 7 rights is comparatively slight and is outweighed by the Employer's substantial business justification.⁽³⁾ In this regard, the work done by Ritter and the Employer as joint employers was subcontracted to a Union signatory, which was consistent with the subcontracting clause in the new area agreement to which Ritter was bound.⁽⁴⁾ Therefore, this subcontracting was not in derogation of any bargaining obligation that the Employer may have had with the Union based on its joint employer relationship with Ritter. Moreover, the Employer has had a long-standing plan to change from a traditional general contractor which maintained a self-performing workforce and become a non-employing construction manager, and this plan was devoid of any Section 7 motivation. We note that the Employer devised and began to implement the plan at a time when it had and was seeking to maintain a collective bargaining relationship with the Union, prior to the Section 7 activity involved herein. The fact that the final step in its implementation may have adversely impacted Section 7 rights does not alter the legitimacy of the Employer's previously formulated plan.

B.J.K.

¹ There is no evidence that the Employer's decision to become a non-employing construction manager was a sham or that it is not a permanent change. Should the Union obtain such evidence in the future, it may file a new charge.

² 380 U.S. 263, 269-74 (1965).

³ See *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *International Paper Co.*, 319 NLRB 1253, 1269-70 (1995), enf. den. 115 F.3d 1045, 155 LRRM 2641 (D.C. Cir. 1997).

⁴ We also note that while the employees were working for Ritter and Shoemaker as joint employers, the employing entities applied the terms and conditions of the new area agreement. Under these circumstances, the Employer's creation of a joint employer relationship with Ritter was not violative of Section 8(a)(3).